fits due from the surviving partners as constructive trustees, an allowance ought to be made for the losses the firm had incurred. The whole transaction should be "adopted or repudiated."

It does not follow, however, that the estate of the *cestui-que-trust* should bear the same proportions of such losses as would fall to the share of a partner entitled to an equal interest. It has been shown that it is only in very rare instances that the *cestui-que-trust* can recover a share of the profits equal to the ratio which his interest bears to the capital of the firm, since an allowance must be made in nearly every case as compensation to the partners for labor and skill. Hence, it would seem only just to the *cestui-que-trust* to deduct the same fraction from the losses of the firm before he is called upon to share them. If, for example, an allowance of one-fifth of the total profits were to be made as compensation for skill, and the *cestui-que-trust* awarded four-fifths of the profits earned by the use of his money, he should only be held liable for four-fifths of the losses incurred. Therefore, in the statement of the account for a year in which there have been losses, a sum should be deducted from the balance due to the trust estate at the beginning of that year, exactly equivalent to the sum which would have been added to the balance, if, instead of losses, the year's operations had yielded profits to an equal amount.

RUSSELL DUANE.

United States Supreme Court.

IN RE RAHRER.

[Decided May 25th, 1891.]

The exclusive power of Congress over interstate and foreign commerce does not prevent a State from affecting the subject of commerce in the exercise of her power of police legislation, provided such legislation does not conflict with the will of Congress relative to the subjects of commerce.

The will of Congress is expressed in the course of legislation, and can be determined by the Courts as well from what Congress has not done as from positive laws.

The Act of August 8, 1890, declared in effect that State laws passed in the exercise of the police powers of the State, though they affected intoxicating liquors which were the subjects of commerce, did not conflict with

the will of Congress. This was nothing more than an authoritive interpretation by Congress of its own previous legislation, which interpretation, not making the will of Congress conflict with the Constitution, will be followed by this Court.

The laws of Kansas (1 Gen. Stat. Kansas, c. 31, §§ 9, 380, 381, 386), which provide for the punishment of those who sell, or offer for sale, intoxicating liquors, can without conflict with the will of Congress as expressed in its legislation, be applied to an importer who sold liquors brought from other States in the packages in which he had imported them.

Statement of the Case.

This was an appeal by the State of Kansas from the judgment of the United States Circuit Court for Kansas, granting the petition of Charles A. Rahrer for a writ of *habeas corpus*.

The facts were as follows:

In June, 1890, Maynard, Hopkins & Company, wholesale liquor dealers, of Kansas City, Missouri, appointed Charles A. Rahrer, the petitioner, as their agent in Topeka, Kansas, to sell in the unbroken package of importation liquors shipped by them from Kansas City, Missouri, to Topeka, Kansas.

In July, 1890, Maynard, Hopkins & Co., shipped to the petitioner a car load of intoxicating liquors.

On the 9th day of August, 1890, the petitioner, as agent for Maynard, Hopkins & Company, offerred for sale and sold, in the unbroken package of importation, one pony keg of beer; also, one pint of whiskey.

The keg of beer was separate and distinct from all other kegs of beer, and was shipped as a separate and distinct package by Maynard, Hopkins & Company.

The same was true of the whiskey.

The petitioner was arrested by the Sheriff of Shawnee County.

The Circuit Court for the District of Kansas, granted a writ of *Habeas Corpus* and discharged the prisoner on the ground that Rahrer was wrongfully restrained of his liberty in violation of the Constitution of the United States: 43 Fed. Rep. 556. Whereupon the case was brought to the Supreme Court by appeal.

The Constitution of Kansas provides: "The manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific and mechanical purposes:" 1 Gen. Stat. Kansas, 1889, p. 107. The sections of the Kansas statutes claimed to have been violated by the petioner are as follows:

"Any person or persons who shall manufacture, sell or barter any spiritous or other intoxicating liquors shall be guilty of a misdemeanor, and punished as hereinafter provided: Provided, however, That such liquors may be sold for medical, scientific and mechanical purposes, as provided in this Act."

"It shall be unlawful for any person or persons to sell or barter for medical, scientific or mechanical purposes, any malt, vinous, spritous, fermented, or other intoxicating liquors, without having first procured a druggist permit therefor from the probate judge of the county wherein such druggist may be doing business at the time, etc."

"Any person, without taking out and having a permit to sell intoxicating liquors, as provided in this Act, or any person not lawfully and in good faith engaged in the business of a druggist, who shall, directly or indirectly, sell or barter any spiritous, malt, vinous, fermented or other intoxicating liquors, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than one hundred dollars or more than five hundred dollars, and be imprisoned in the county jail not less than thirty days nor more than ninety days:" 1 Gen. Stat. Kansas, c. 31, §§ 380, 381, 386.

On April 28th, 1890, the Supreme Court of the United States decided that "A statute of a State, prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical, or sacramental purposes, and under a license from a county Court of the State, is, as applied to a sale by the importer, and in original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another State, unconstitutional and void, as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several States:" *Leisy* v. *Hardin*, 135 U. S. 100.

On August 8th, 1890, an Act of Congress was approved, usually known as "Wilson Bill," the text of which is as follows:

"That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors or liquids had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise:" 26 Stat. 313, c. 728.

OPINION OF THE COURT.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the Court.

The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive.

And this Court has uniformly recognized State legislation, legitimately for police purposes, as not in the sense of the Constitution necessarily infringing upon any right which has been confided expressly or by implication to the National Government.

The Fourteenth Amendment, in forbidding a State to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest Congress with power to legislate upon subjects which are within the domain of State legislation.

As observed by Mr. Justice Bradley, delivering the opinion of the Court in the *Civil Rights Cases*, 109 U. S. 3, 13, the legislation under that amendment cannot properly cover the

whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would be to establish a code of municipal law, regulative of all private rights between man and man in society. It would be to make Congress take the place of the State Legislatures and to supersede them. It is absurd to affirm that because the rights of life, liberty, and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may, therefore, provide due process of law, for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws is prohibited by the amendment, therefore, Congress may establish laws for their equal protection.

In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual States, and cannot be assumed by the National Government, and that in this respect it is not interfered with by the Fourteenth Amendment: *Barbier* v. *Connolly*, 113 U. S. 27, 31.

The power of Congress to regulate commerce among the several States, when the subjects of that power are national in their nature, is also exclusive. The Constitution does not provide that interstate commerce shall be free, but by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case, is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States: *Robbins* v. *Shelby Taxing District*, 120 U. S. 489. And if a law passed by a State in the exercise of its acknowledged powers, comes into conflict with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy, and that of the laws passed in pursuance thereof: *Gibbons* v. *Ogden*, 9 Wheat. 1, 210. That which is not supreme must yield to that which is supreme: *Brown* v. *Maryland*, 12 Wheat. 419, 448.

"Commerce, undoubtedly, is traffic," said Chief Justice

Marshall, "but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." Unquestionably, fermented, distilled or other intoxicating liquors or liquids are subjects of commercial intercourse, exchange, barter and traffic, between nation and nation, and between State and State, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of Courts. Nevertheless, it has been often held that State legislation, which prohibits the manufacture of spiritous, malt, vinous, fermented, or other intoxicating liquors within the limits of a State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States or by the amendments thereto: *Mugler* v. *Kansas*, 123 U. S. 623, and cases cited. "These cases," in the language of the opinion in *Mugler* v. *Kansas*, p. 659, "rest upon the acknowledged right of the States of the Union to control their purely internal affairs, and, in so doing, to protect the health, morals and safety of their people by regulations that do not interfere with the execution of the powers of the general Government, or violate rights secured by the Constitution of the United States. The power to establish such regulations, as was said in *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, reaches everything within the territory of a State not surrendered to the National Government." But it was not thought, in that case, that the record presented any question of the invalidity of State laws, because repugnant to the power to regulate commerce among the States. It is upon the theory of such repugnancy that the case before us arises, and involves the distinction which exists between the commercial power and the police power, which, "though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them:" 12 Wheat. 441.

And here the sagacious observations of Mr. Justice Catron, in the *License Cases*, 5 How. 599, may profitably be quoted, as they have often been before: "The law and the decision apply equally to foreign and to domestic spirits as they must do on the principles assumed in support of the law. The assumption is, that the police power was not touched by the Constitution, but left to the States as the Constitution found it. This is admitted; and whenever a thing from character or condition, is of a description to be regulated by that power in the State, then the regulation may be made by the State, and Congress cannot interfere. But this must always depend on facts, subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of foreign commerce, or of commerce among the States. If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the State that it no longer belongs to commerce, or, in other words, is not a commercial article, then the State power may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the State and the Federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this Court in the cases of *Gibbons* v. *Ogden*; *Brown* v. *The State of Maryland*; and *New York* v. *Miln*. What, then, is the assumption of the State Court? Undoubtedly, in effect, that the State had the power to declare what should be an article of lawful commerce in the particular State; and, having declared that ardent spirits and wines were deleterous to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of Congress could not interfere. The exclusive State power is made to rest, not on the fact of the state or condition of the article,

nor that it is property usually passing by sale from hand to hand, but on the declaration found in the State laws and asserted as the State policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the State is attempted to be created, in a case where it did not previously exist. If this be the true construction of the Constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the States, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated. Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the State police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning adopted by the State and its Courts could bring within the police power any article of consumption that a State might wish to exclude, whether it belonged to that which was drank, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher grounds than the light wines of this and other countries, excluded in effect, by the law as it now stands. And it would only be another step to regulate real or supposed extravagance in food and clothing. And in this connection it may be proper to say, that the three States whose laws are now before us had in view an entire prohibition from use of spirits and wines of every description, and that their main scope and object is to enforce exclusive temperance as a policy of State, under the belief that such a policy will best subserve the interests of society, and that to this end, more than to any other, has the sovereign power of these

States been exerted; for it was admitted, on the argument, that no licenses are issued, and that exclusion exists, so far as the laws can produce the result—at least, in some of the States—and that this was the policy of the law. For these reasons, I think the case cannot depend on the reserved power in the State to regulate its own police." And the learned Judge reached the conclusion that the law of New Hampshire, which particularly raised the question, might be sustained as a regulation of commerce, lawful, because not repugnant to any actual exercise of the commercial power by Congress. In respect of this the opposite view has since prevailed, but the argument retains its force in its bearings upon the purview of the police power as not concurrent with and necessarily not superior to the commercial power.

The laws of Iowa under consideration in *Bowman* v. *Railway Company*, 125 U. S. 465, and *Leisy* v. *Hardin*, 135 U. S., 100, were enacted in the exercise of the police power of the State, and not at all as regulations of commerce with foreign nations and among the States, but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one State and another, or another country and this, they amounted in effect to a regulation of such commerce. Hence, it was held that inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character and must be governed by a uniform system, so long as Congress did not pass any laws to regulate it specifically, or in such way as to allow the laws of the State to operate upon it, Congress thereby indicated its will that such commerce should be free and untramelled, and therefore that the laws of Iowa, referred to, were inoperative in so far as they amounted to regulations of foreign or interstate commerce, in inhibiting the reception of such articles within the State, or their sale upon arrival, in the form in which they were imported there from a foreign country or another State. It followed as a corollary that, when Congress acted at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured.

Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a State, fall within the category of domestic articles of similar nature. Is the law open to constitutional objection?

By the first clause of Section 10 of Article I, of the Constitution, certain powers are enumerated which the States are forbidden to exercise in any event; and by clauses two and three, certain others, which may be exercised with the consent of Congress. As to those in the first class, Congress cannot relieve from the positive restriction imposed. As to those in the second, their exercise may be authorized; and they include the collection of the revenue from imposts and duties on imports and exports, by State enactments, subject to the reversion and control of Congress; and a tonnage duty, to the exaction of which only the consent of Congress is required. Beyond this, Congress is not empowered to enable the State to go in this direction. Nor can Congress transfer legislative powers to a State nor sanction a State law in violation of the Constitution; and if it can adopt a State law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power: *Cooley* v. *Port Wardens of Philadelphia*, 12 How. 299; *Gunn* v. *Barry*, 15 Wall. 610, 623; *United States* v. *Dewitt*, 9 Wall. 41.

It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State. This being so, it is urged that the Act of Congress cannot be sustained as a regulation of commerce, because the Constitution, in the matter of interstate commerce, operates *ex proprio vigore* as a restraint upon the power of Congress to so regulate it as to bring any of its subjects within the grasp of the police power of the State. In other words, it is earnestly contended that the Constitution guarantees freedom of commerce among the States in all things, and that not only may intoxicating liquors be imported from one State into another, without being subject to regulation under the laws of the latter, but that Congress is powerless to obviate the result.

Thus, the grant to the general government of a power designed to prevent embarassing restrictions upon interstate commerce by any State, would be made to forbid any restraint whatever. We do not concur in this view. In surrendering their own power over external commerce, the States did not secure absolute freedom in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to Congress.

By the adoption of the Constitution the ability of the several States to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the general government substituted. No affirmative guaranty was thereby given to any State of the right to demand as between it and the others what it could not have obtained before; while the object was undoubtedly sought to be attained of preventing commercial regulations partial in their character or contrary to the common interests. And the magnificent growth and prosperity of the country attest the success which has attended the accomplishment of that object. But this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits enact the law in question. In so doing, Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States or to adopt State laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in State laws in dealing with such property.

The principle upon which local option laws, so called, have been sustained is, that while the Legislature cannot delegate its power to make a law, it can make a law which leaves it to municipalities or the people to determine some fact or state of things, upon which the action of the law may depend; but we do not rest the validity of the Act of Congress on this analogy.

The power over interstate commerce is too vital to the integrity of the nation to be qualified by any refinement of reasoning. The power to regulate is solely in the general Government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or State: 12 Wheat. 448.

No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.

The differences of opinion which have existed in this tribunal in many leading cases upon this subject, have arisen, not from a denial of the power of Congress, when exercised, but upon the question whether the inaction of Congress was in itself equivalent to the affirmative interposition of a bar to the operation of an undisputed power possessed by the States.

We recall no decision giving color to the idea that when Congress acted, its action would be less potent than when it kept silent.

The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge. The manner of that disposition brought into determination upon this record, involves no ground for adjudging the Act of Congress inoperative and void.

We inquire then, whether fermented, distilled, or other intoxicating liquors or liquids transported into the State of Kansas, and there offered for sale and sold, after the passage of the Act, became subject to the operation and effect of the existing laws of that State in reference to such articles. It is said that this cannot be so, because, by the decision in *Leisy* v. *Hardin*, similar State laws were held unconstitutional, in so far as they prohibited the sale of liquors by the importer in the condition in which they had been imported. In that case,

certain beer imported into Iowa had been seized in the original packages or kegs, unbroken and unopened, in the hands of the importer, and the Supreme Court of Iowa held this seizure to have been lawful under the statutes of the State. We reversed the judgment upon the ground that the legislation to the extent indicated, that is to say, as construed to apply to importations into the State from without, and to permit the seizure of the articles, before they had by sale or other transmutation, become a part of the common mass of property of the State, was repugnant to the third clause of section eight of article one of the Constitution of the United States, in that it could not be given that operation without bringing it into collision with the implied exercise of a power exclusively confided to the general government. This was far from holding that the statutes in question were absolutely void, in whole or in part, and as if they never had been enacted. On the contrary, the decision did not annul the law, but limited its operations to property strictly within the jurisdiction of the State.

In *Chicago, Milwaukee, &c. Railway* v. *Minnesota*, 134 U. S. 418, it was held that the Act of the Legislature of the State of Minnesota, of March 7th, 1887, establishing a railroad and warehouse commission, as constructed by the Supreme Court of that State, by which construction we were bound in considering the case, was in conflict with the Constitution of the United States in the particulars complained of by the railroad company, but, nevertheless, the case was remanded with an instruction for further proceedings. And Mr. Justice Blatchford, speaking for this Court, said: "In view of the opinion delivered by that Court, it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a mandamus, if the Court should adhere to its option that under the statute, it cannot investigate judicially the reasonableness of the rates fixed by the commission."

In *Tiernan* v. *Rinker*, 102 U. S. 123, an Act of the Legislature of the State of Texas, levying a tax upon the occupation of selling liquors, malt and otherwise, but not of selling

domestic wines or beer, was held inoperative so far as it discriminated against imported wines or beer, but as Tiernan was a seller of other liquors as well as domestic, the tax against him was upheld.

In the case at bar, petitioner was arrested by the State authorities for selling imported liquor on the 9th of August, 1890, contrary to the laws of the State. The Act of Congress had gone into effect on the 8th of August, 1890, providing that imported liquors should be subject to the operation and effect of the State laws to the same extent and in the same manner as though the liquors had been produced in the State; and the laws of Kansas forbade the sale. Petitioner was thereby prevented from claiming the right to proceed in defiance of the law of the State, upon the implication arising from the want of action on the part of Congress up to that time. The laws of the State had been passed in the exercise of its police powers, and applied to the sale of all intoxicating liquors whether imported or not, there being no exception as to those imported and no inference arising, in view of the provisions of the State Constitution and the terms of law (within whose mischief all intoxicating liquors came), that the State did not intend imported liquors to be included. We do not mean that the intention is to be imputed of violating any constitutional rule, but that the State law should not be regarded as less comprehensive than its language is, upon the ground that action under it might in particular instances be adjudged invalid from an external cause.

Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction.

It appears from the agreed statement of facts that this liquor arrived in Kansas prior to the passage of the Act of

Congress, but no question is presented here as to the right of the importer in reference to the withdrawal of the property from the State, nor can we perceive that the Congressional enactment is given a retrospective operation by holding it applicable to a transaction of sale occuring after it took effect. This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the Act of Congress. That Act, in terms, removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the State law was required before it could have the effect upon imported which it had always had upon domestic property.

Jurisdiction attached, not in virtue of the law of Congress, but because the effect of the latter was to place the property where jurisdiction could attach.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Mr. Justice Harlan, Mr. Justice Gray and Mr. Justice Brewer concurred in the judgment of reversal, but not in all the reasoning of the opinion of the Court.

THE TERM EXCLUSIVE AS APPLIED TO THE FEDERAL POWER OVER COMMERCE.

Hamilton's Rule for determining when a power was exclusive in Congress.

"This exclusive delegation, or rather this alienation of State Sovereignty," says Hamilton, "would only exist in three cases; where the Constitution, in express words, granted an exclusive authority in the union; where it granted in one instance an authority to the union; and in another prohibited the states from exercising a like authority; and where it granted an authority to the union to which a similar authority in the states would be absolutely and totally *contradictory* and *repugnant:*" Federalist, Number 32.

A grant to Congress, where the words of the Constitution are not explicit, depends on the subject matter of the grant. And it follows that whether we consider a particular legislative power as exclusively in Congress, will depend in a great measure on what we consider is the effect on the legislative power of the states of the delegation of an *exclusive* power to the Federal Government.

The history of the cases dealing with the power of Congress over commerce attest the truth of this assertion. The effect of an exclusive power of legislation in Congress on the legislative power of the states, which forms the content of the term, "exclusive power of Congress," has undergone no less than three radical modifications when applied the subject of commerce.

Mr. Webster's view of the nature of an exclusive power.

In the case of *Gibbons* v. *Ogden*, 9 Wh. 1, two views of the nature of an exclusive power in Congress are advanced. The State of New York granted to Robert R. Livingston and Robert Fulton the exclusive right to navigate, with boats moved by steam, the waters within her jurisdiction. Gibbons was the owner of two steamboats for which he had procured coasting licenses, as provided by the laws of the United States. These boats he attempted to run from Elizabethtown, New Jersey, to the City of New York, when he was stopped by an injunction issued by the highest court of the state. An appeal was then taken to the United States Supreme Court. The case for the appellants was argued on two grounds: First, regulations of commerce are exclusively in Congress; Second, even if the state had a right to regulate commerce by granting a coasting license, Congress had given the boat a right to pass unhindered over all the navigable waters of the United States, and any state law abridging this right was in conflict with the actual regulations of Congress on the subject.

The decision, declaring the law of New York void, was based on the second contention, and, therefore, cannot be said to have determined the question whether the power of Congress over commerce was exclusive or concurrent. Mr. Justice Johnson in his concurring opinion criticises the majority for basing their opinion on such a narrow ground. He says, "I do not regard it (the license) as the foundation of the right set up in behalf of the appellant . . . and I cannot overcome the conviction, that if the licensing act was repealed tomorrow, the right of the appellant to the reversal of the decision complained of, would be as strong as it is under this license:" 19 Wh. pp. 231, 232. On the other hand it must be admitted that Mr. Justice Story, who was one of the majority, undoubtedly considered that the exclusive right of the Federal power over commerce had been finally determined: 11 Pet. 102; see *infra*.

The argument of counsel and the opinion set forth very clearly the different ideas of the effect of an exclusive power on the power of state legislation. Mr. Webster, the counsel for the appellant, Ogden, in an argument of unexcelled ability, contended that the power over commerce was exclusive from the nature of the union and the purposes of the grant. He says: "From the very nature of the case, these powers (of Congress over Commerce) must be exclusive; that is the higher branches of commercial regulation must be exclusively committed to a single hand. What is to be regulated? Not the commerce of the several states, respectively, but the commerce of the United States. Henceforth, the

commerce of the states was to be a *unit;* and the system by which it was to exist and be governed, must necessarily be complete, entire and uniform. It should be repeated that the words used in the constitution, "to regulate commerce," are so very general and extensive, that they might be construed to cover a vast field of legislation, part of which has always been occupied by state laws; and, therefore, the words must have a reasonable construction, and the power should be considered as exclusively vested in Congress, so far, and so far only, as the nature of the power requires." And he insisted, "that the nature of the case, and of the power, did imperiously require, that such important authority as that of granting monopolies of trade and navigation, should not be considered as still retained by the states." 9 Wh. pp. 13, 14.

Yet Mr. Webster in the same argument admits that a state can pass laws which affect commerce in spite of the exclusive nature of the grant to the Federal Government. He, therefore, admits the constitutionality of state laws establishing turnpikes, and of state quarantine laws "Generally speaking," he argued, "roads and bridges, and ferries, though, of course, they affect commerce and intercourse, do not attain that importance and elevation, as to be deemed *commercial regulations.* . . . quarantine laws, for example, may be considered as affecting commerce, yet they are in their nature *health* laws. In England, we speak of the power of regulating commerce, as in Parliament, or the King, as arbiter of commerce; yet the City of London enacts health laws. Would anyone infer from that circumstance, that the City of London had concurrent power with Parliament, or the Crown to *regulate commerce?* Or, that it might grant a monopoly of navigation of the Thames?" And he adds, "While a health law is reasonable, it is a health law; but, if under color of it, enactments should be made for other purposes, such enactments might be void:" 9 Wh. p. 20.

Chief Justice Marshall's view of the nature of an exclusive power.

Mr. Webster's point of view is adopted by Chief Justice Marshall. Speaking of the state inspection laws, he says: "That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. . . . They form a portion of that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass." . . . "It is obvious that the government of the union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the states, may use means that may also be employed by a state, in the exercise of its acknowledged powers; that for example,

of regulating commerce within the state. If Congress license vessels to sail from one port to another, into the same state, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of the direct power to regulate the purely internal commerce of a state, or to act directly on its system of police. So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the state, and may be executed by the same means. All experience shows, *that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers;* but this does not prove that the powers themselves are identical." (9 Wh. p. 203, 204.)

Mr. Oakley's, theory of the nature of an exclusive power.

Mr. Oakley assumes in his argument in support of the law of New York, that if the states and Congress have no concurrent powers, then the provisions in the Constitution that the laws made in pursuance of it should be supreme was useless. Thereby implying that an exclusive power in Congress over such a thing as interstate and foreign commerce, would prevent a state, even in the exercise of its reserved powers, from passing any laws which Congress could pass in the exercise of its power over commerce. He says: "The provision, that the law of Congress shall be the supreme law in such cases, is the ground of a conclusive inference, not only that there are concurrent powers, but that those powers may be exercised by both governments at the same time. One law cannot be said to be superior to another and to control it, unless it acts in a manner inconsistent with and repugnant to that other law. The question of supremacy, therefore, can never arise, unless in a case of actual conflict or interference. If the mere exercise of a power by Congress takes away all right from the state to act under that power, then any state law, under such a power, would be void; not as conflicting with the supreme law of Congress, but as being repugnant to the provisions of the constitution itself, and as being passed by the state, in the first instance, without authority. If this doctrine were true, then the provision that the laws of Congress should be supreme, was entirely idle. It would have been sufficient to have said merely, that the constitution should be supreme." 9 Wh. p. 41.

It is to this contention, that an exclusive power in Congress prevents a State passing any laws which Congress could by any possibility pass in the exercise of the power exclusively delegated to it, that the remarks I have italicized in the above quotation from Chief Justice Marshall's opinion were directed.

The decision in Wilson v. Black Bird Creek Marsh Co.

The opinion of Chief Justice Marshall that an exclusive power in Congress to regulate commerce only prevented the states from pass-

ing laws which in effect regulated commerce as commerce, and does not prevent them from passing laws in the exercise of their reserved powers, which incidentally affected commerce, provided such regulations do not conflict with the actual legislation of Congress, was apparently concurred in by all the members of his court. On this principle they supported the law of Delaware, in *Wilson* v. *Blach Bird Creek Marsh Co.:* 2 Pet. 240.

The State of Delaware authorized the Black Bird Creek Marsh Co. to obstruct the Black Bird Creek by erecting dams. The Black Bird Creek, in the language of Mr. Wirt, one of the counsel in the case, "Is one of those sluggish reptile streams, that do not run, but creep, and which, wherever it passes, spreads its venom and destroys the health of all who inhabit its marshes:" 2 Pet. p. 249. The measure was one designed to improve the sanitary condition of a considerable section of country, and was at the same time plainly adapted to that end. On the other hand, the stream was navigable. A ship called the "Sally," regularly licensed and enrolled according to the navigation laws of Congress, broke down the dam which obstructed the stream. An action of trespass *vi et armis* was brought by the company. The defendant claimed that the company had unlawfully obstructed a public navigable stream. He relied in the argument mainly on the decision of the Supreme Court of the United States in the case of *Gibbons* v. *Ogden*. The case came to the Supreme Court on a judgment of the State Court, sustaining the demurrer of the plaintiffs to the pleas of the defendant. The Supreme Court affirmed the judgment. Chief Justice Marshall said: "The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States to regulate commerce with foreign nations and among the several states.

"If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce; the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound through the lower country of the middle and southern states, we should feel not much difficulty in saying that a state law coming in conflict with such act would be void; but Congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among several states; a power which has not been so exercised as to affect the question:" 2 Pet. p. 252.

Mr. Justice Story apparently adopted Mr. Oakley's view of the nature of an exclusive power over commerce.

The views as to the exclusive nature of the power of commerce, and the nature of an exclusive power, thus twice reiterated in an opinion of the court, would have probably settled down into fixed constitutional principles, had it not been for the apparent adoption of Mr. Oakley's view of the nature of an exclusive power by Mr. Justice Story in his dissent in *New York* v. *Miln*, 11 Pet. 102.

New York had passed a law re-

quiring, among other things, the master of any ship from a foreign country to make, within twenty-four hours after the arrival of his vessel, an affidavit of the name, age, and occupation, etc., of each of his passgers. There was a penalty of $75.00 attached to each and every violation of the ordinance: Act of February 11th, 1824. The court held the Act constitutional.

Mr. Blount, counsel for the state, had assumed as Mr. Oakley had done in *Gibbons* v. *Ogden*, that if the court decided the power over commerce to be exclusively in Congress, the state harbor laws and quarantine laws would be void. He even went so far as to give a complete list of all the harbor and quarantine laws of the various states, apparently for the purpose of appalling the court, by showing them the sweeping and far-reaching results of a decision adverse to the state. The Opinion of Mr. Justice Barbour, nominally that of the majority (subsequently there was a discussion among the members of the bench as to whether the opinion of Mr. Justice Barbour was properly the opinion of the court: see *Passenger Cases*, 9 How. pp. 443-487), adopted Chief Justice Marshall's view of the nature of an exclusive power. "We shall not enter into any examination of the question whether the power to regulate commerce be, or be not, exclusive of the states, because the opinion we have formed renders it unnecessary; in other words, we are of the opinion that the act is not a regulation of commerce, but of police; and that being so considered, it was passed in the exercise of a power which rightfully belonged to the states: 11 Pet. p. 132.

Mr. Justice Story, however, in his dissent, says: "It has been argued that the Act of New York is not a regulation of commerce, but is a mere police law on the subject of paupers; . . . *A state cannot make a regulation of commerce to enforce its health laws, because it is a means withdrawn from its authority.* It may be admitted that it is a means adapted to the end; but it is quite a different question whether it be a means within the competency of the state's jurisdiction." And he adds, "But how can it be truly said that the Act of New York is not a regulation of commerce? *No one can well doubt, that if the same act had been passed by Congress it would have been a regulation of commerce*, and in that way, and in that only, would it be a constitutional act of Congress. The right of Congress to pass such an act has been expressly conceeded in the argument: 11 Pet. 156, 157.

An exclusive power with Mr. Justice Story would thus seem to deprive the state of the right to pass any act which Congress might pass in the exercise of her exclusive power; and though he admits that the state may pass "health laws, quarantine laws, ballot laws, gunpowder laws, and others of a similar nature," he appears from what he subsequently says to do so because Congress, in the exercise of any of its own powers, could not pass such laws.

In view of this difference between the ideas of Mr. Justice Story and the Chief Justice as to the meaning of an exclusive power, it is supris-

ing to read at the end of Judge Story's dissent: "Such is a brief view of the grounds upon which my judgment is, that the act of New York is unconstitutional and void. In this opinion, I have the consolation to know that I had the entire concurrence, upon the same grounds, of that great constitutional jurist, the late Mr. Chief Justice Marshall." We cannot but think that "upon the same grounds" did not mean on "all grounds." Mr. Justice Story also puts his decision on the conflict of the state laws with the actual regulations of Congress. Chief Justice Marshall would not be likely to abandon, though he might modify, the idea of the nature of an exclusive power he had so clearly stated.

The various ideas of exclusive and concurrent powers maintained by the members of the court in the License Cases.

The idea of an exclusive power advanced by Mr. Justice Story, concerning the result on the state power of legislation of considering the power to regulate commerce as exclusively in Congress, led many members of the Bench to consider the power over commerce as concurrent in the states. The argument for the concurrent power of the states over commerce based on the early adoption of the state pilot laws by Congress, was now almost irresistable. Either the pilot laws were invalid, or the power to regulate commerce was concurrent. The confusion resulting from this change of feeling, both as to the nature of an exclusive power, and as to the nature of the power to regulate commerce, is well shown by the opinion of four of the members of the court in the "License Cases:" 5 How. p. 507.

The most important of these cases was that of *Peirce* v. *New Hampshire*. The laws of that state made it an offense, punishable by a fine, for any one to sell wine or other spiritous liquors without a license from the selectmen of the town. One Pierce, imported coastwise from Boston a barrel of American gin, and sold the same in the unbroken packages, or barrel, without first obtaining the required license. For this he was indicted and fined in the courts of the state. He appealed to the Supreme Court on the ground that the act conflicted with the power over commerce granted to Congress. The judges all concurred in the decision sustaining the conviction and the constitutionality of the law of New Hampshire as applied to the facts of the case, but were unable to agree on the ground of their decision, and therefore furnished separate opinions.

The opinion of Chief Justice Taney shows, it must be confessed, a certain confusion of thought on the subject of the nature of an exclusive power. Some passages seem to indicate that he had adopted the view of an exclusive power held by his predecessor. As for instance, the following: "The controlling and supreme power over commerce with foreign nations and the several states is undoubtedly conferred upon Congress. Yet, in my judgment, the state may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for

its own territory; and such regulations are valid unless they come in conflict with a law of Congress: 5 How. p. 579. On the other hand he says: "The law of New Hampshire acts directly npon an import from one state to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction o the gene..l government, and subject to its control and regulation.

"The question, therefore, brought up for decision is, whether a state is prohibited by the constitution of the United States from making any regulation of foreign commerce, or of commerce with another state, although such regulation is confined to its own territory:" 5. How. p. 578. This question, Chief Justice Taney answered in the negative. While confessing that the law of New Hampshire regulated commerce, he nevertheless sustained the law because it did not come in conflict with the actual regulation of Congress on the subject. And though it is doubtful whether the Chief Justice would have allowed a State to make laws regulating commerce as commerce which extended beyond her jurisdiction; this is more because a State has no power to extend her jurisdiction, rather than because he considered the power of commerce granted to Congress as exclusive. He certainly believed that the concurrent power of a state over commerce extended so far as the acts which make up commerce take place within the state.

We find in Mr. Justice Catron the clearest advocate of the view of the nature of an exclusive power which had been indicated by Mr. Justice Story. He says: "The assumption is, that the police power was not touched by the constitution, but left to the states as the constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the state, then the regulation may be made by the state and Congress cannot interfere. But this must always depend on facts, subject to legal ascertainment, so that the injured may have redress. And the fact which must first find its support is this, whether the prohibited article belongs to and is subject to be regulated as part of foreign commerce, or of commerce among the states. If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such, when it is about to enter the state, that it no longer belongs to commerce, or in other words, is not a commercial article, then the state power may exclude its introduction. And here is the limit between the sovereign power of the state and the Federal power. *That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state. and that which does belong to commerce is within the jurisdiction of the United States:* 5 How. pp. 519-600. If the power over commerce is exclusive, it prevents the states, not only from regulating commerce as commerce, but excludes them from affecting the subjects of commerce in the exercise of the police or any other reserved power. "This narrows the controversy to the

single point, whether the states have power to regulate their own mode of commerce among the states, during the time the power of Congress lies dormant, and has not been exercised in regard to such commerce:" 5 How. p. 601. And his conclusion that the law of New Hampshire is constitutional, rests entirely on the affirmative answer which he gives to this question. In other words, that the power over commerce is concurrent in the states.

Mr. Justice Nelson concurred in the opinion: 5 How. p, 618.

Mr. Justice McLean and Mr. Justice Grier held the same view regarding an exclusive power as Chief Justice Marshall. That is to say they did not regard it as preventing a state from passing laws of police which affected commerce. There was, however, this vital distinction between them. Whatever view the members of the court had held regarding the nature of particular powers, or the nature of the "exclusive powers" in general, they all agreed on the general proposition, that in case of a conflict between two constitutional laws, one Federal and the other emenating from a State, the laws of Congress were supreme. "In argument," said Chief Justice Marshall, "it has been contended that if a law passed by the state in the exercise of its acknowledged sovereignty comes into conflct with a law passed by Congress in pursuance of the constitution, they affect the subject and each other like equal opposing powers.

"But the framers of our constitution foresaw this state of things and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it:" 9 Wh. p. 210. In the opinion of Mr. Justice McLean, is the first time we find the theory, thus condemned, received with approval by any member of the bench. Speaking of conflicting state and Federal laws, he says: "And when a conflict occurs, the inquiry must necessarily be, which is the paramount law? And that must depend upon the supremacy of the power by which it was enacted:" 5 How. p. 588. And again: "When in the appropriate exercise of these Federal and state powers, contingently and incidentally their lines of action run into each other; if the state power be necessary to the preservation of the morals, the health or the safety of the community, it must be maintained:" 5 How. p. 592-3.

Mr. Justice Grier held the same view as Mr. Justice McLean. In his opinion in the License Cases, he says, speaking of the health and morals of the people, "As subjects of legislation they are from their very nature, of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on the subjects of secondary importance, which relate only to property, commerce, or luxury, to recede when they come in conflict or collision. *Salus populi suprema lex.*"

The confusion of thought in the Passenger Cases.

The next important case or cases to come before the Supreme Court, which involved the commerce clause of the Constitution was the Passenger Cases: 7 How. 283.

The laws of New York, whose constitutionality was brought into question, taxed every cabin passenger arriving from a foreign port $1.50, and any steerage passenger, mate, sailor, or mariner $1.00: Rev. Stat. pp. 445, 446. The money so received was to be denominated "the hospital fund," and was appropriated to the use of the marine hospital.

The majority held that the law was void because it conflicted with the regulations of commerce by Congress.

There were three possible ways in which one could regard this law: First, as a police measure not conflicting with the actual regulations of commerce by Congress, and therefore valid, even though the federal power over commerce was exclusive, provided one adopted the idea of exclusiveness held by Chief Justice Marshall. Second, as a regulation of commerce, because it did that which Congress in the exercise of its power over the subject could do, and therefore void, or constitutional according as one adopted or rejected the theory of a concurrent power over commerce remaining in the states. Lastly, void in any event because conflicting with the actual regulations of Congress. Mr. Justice McLean, while attacking the "Concurrent theory," takes the occasion to reiterate his opinion as to the supremacy of the state police laws in case of a conflct with the laws of Congress: How. pp. 396, 397. He did not consider, however, that the law in question was a police law, but regarded it as a regulation of commerce. Mr. Justice Wayne also thought the law a regulation of commerce such as a state could not make, while admitting that a state could pass quarantine and health laws which affected commerce: 7 How. p. 414. He thus adopted the theory of an exclusive power held by Chief Justice Marshall.

Mr. Justice Catron and the Chief Justice both think the power of the states over commerce is concurrent, but the former regards the law of the state as conflicting with the will of Congress, and therefore void, while the latter does not consider there is such a conflict, and supports the law, pp. 443 and 471. It is true that the Chief Justice mainly rests his opinion on the ground that passengers are not subjects of commerce, and therefore, a state can prohibit foreigners from landing. A position, which, at the present time, would not be tenable: 7 How. pp. 465, 470.

One thing was shown very plainly by the discussion in the Passenger Cases, and that was, that the opinion that the states held a concurrent power over commerce, did not by any means settle the disputes over the commerce clause in the Constitution. It was more difficult to tell when a law of a state law conflicted with the will of the Congress, than to decide in the first place whether the federal power was exclusive or concurrent.

The decision in Cooley v. *Board of Wardens*:

It was in this state of conflicting and confused opinion on the bench itself that the case of *Cooley* v. *Port Wardens* (12 How. 299) came before the court. This case involved the constitutionality of the pilot regulations of a state. The court

might have decided that the power to regulate commerce was concurrent, and thus upheld the validity of laws which had remained unquestioned for over fifty years. To say the power over commerce was exclusively iu Congress, would under the idea of an exclusive power entertained by Justices Story and Catron, rendered these laws unconstitutional.

The opinion of the court by Mr. Justice Curtis is noticeable from two points of view. First, it is written on the assumption that the pilot laws are a direct regulation of commerce by the states. "And a majority of the court," he says, "are of an opinion that a regulation of pilots is a regulation of commerce within the grant of Congress of the commercial power." (12 How. p. 317.) To uphold their constitutionality, he was obliged to support the theory that the states had a concurrent power over commerce, for he assumes that did he hold the power of Congress over commerce to be exclusive, the pilot laws would be unconstitutional, forgetting that Chief Justice Marshall had regarded these laws as valid, while he had at the same time thought the power of Congress over commerce to be exclusive. The assumption of the invalidity of the pilot laws if the power over commerce was exclusively in commerce, was a complete triumph of the idea of an exclusive power, apparently entertained by Mr. Justice Story, and which would prevent a State from passing any law which Congress could pass in the exercise of that power.

The other noticeable feature of the decision was the division of the nature of the power of Congress over commerce, as concurrent or exclusive, according to the particular subject of the power. Mr. Justice Curtis says: "Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single rule, operating equally on the commerce of the United States in every port; and some like the subject now in question, as imperatively demanding the diversity, which alone can meet the local necessity of navigation.

Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to loose sight of the nature of the subjects of this power, and to assert concerning all of them what is really applicable to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." 12 How. p. 319. From this decision we can reduce two propositions: First, that the nature of the power over commerce was divisible, partly exclusive, partly concurrent, depending upon the nature of the subject. Second, that the word *exclusive* must be taken in the sense it is employed by Mr. Justice Story, and not in the sense employed by Chief Justice Marshall; therefore, where from the nature of the subject the commercial power was exclusive, a state law which affected such a subject, though passed in good faith, as a police

measure, or for the object of improving the internal commerce of the country, would be unconstitutional.

Cooley v. *Board of Port Wardens* decided that the states had a concurrent power over pilots. This decision was followed in *Steamship Co.* v. *Joliffe*, 2 Wall. 450; *Ex. Parte* McNeil 13 Wall., 236; *Wilson* v. *McNamee*, 102 U. S. 572.

For the next few years the decision of the court in cases involving the commerce clause are mainly employed in showing the limit of the concurrent power of the states over commerce. Thus, it has been held that a State cannot bridge a stream which forms her boundary: See *Pennsylvania* v. *Wheeling Bridge Company*, 13 How. 518; but she can, on the other hand, bridge navigable streams wholly within her borders. *Gillman* v. *Philadelphia*, 3 Wall. 713; *Escanaba Company* v. *Chicago*, 107 U. S. 678; *Cadwell* v. *Bridge Company*, 113 U. S. 205; *Hamilton* v. *Vicksburg Railroad Company*, 119 U. S. 280; *Williamette Bridge Company* v. *Hatch*, 125 U. S. 1.

Not only can the states build bridges over certain streams, but also dams, partially or totally obstructing their navigation. *Pound* v. *Truck*, 95 U. S. 459. In the improvement of her water ways a State can alter the course of a river. *Withers* v. *Buckley*, 20 How. 84, or turn a river into a canal, and charge vessels for its use, to pay for the improvement. *Sands* v. *Improvement Company*, 123 U. S. 288; *Ruggles* v. *Ibid.* 123 U. S. 297 A State can also improve her harbors. *County of Mobile* v. *Kimball*, 102 U. S., p. 691; or build her own wharves. *Ouchita Packet Company* v. *Arkin*, 121 U. S. 444.

For a full discussion of this subject see the *American Law Register*, article on "The Law Governing an Original Package," in July, August, November, December, 1890. The general conclusion from the cases there cited, into which it would be a work of supererogation to enter here, is that, those subjects of commerce which require a uniform regulation, are from their nature, exclusively under the control of Congress. But at the same time the state has not, necessarily, a concurrent authority over all subjects which may demand diversified legislation. True, the power over subjects, requiring uniform regulation is exclusively in Congress, because the necessity for uniformity proves the national nature of the subject. But subjects requiring diversified legislation may also be in their nature national. As we saw in the "bridge-cases" cited above.

The doctrine of the Silence of Congress:

The case of *Welton* v. *State of Missouri*, 91 U. S. 275, marks the initial step towards a return to Chief Justice Marshall's view of the exclusive nature of the power over commerce, and of the consequence of an exclusive power on the legislative power of the states. The State of Missouri passed a law requiring "Whoever shall deal in the selling of patent or other medicine goods, wares, or merchandise, except books, charts, maps, and stationery, which are not the growth, produce, or manufacture of the state, by going from place to place to sell the same, is declared

to be a peddler." The other sections of the law prohibit a person dealing as a peddler without a license. For the license a tax was charged. No license was required for selling by going from place to place with the products of the state. It was probably contended in the oral argument before the court, that the state had a right to impose such regulation since it did not conflict with the actual regulations of commerce by Congress, for Mr. Justice Field, who delivers the opinion of the court, says: "The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its action on this subject, *when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled.* As the main object of that commerce is the sale and the exchange of commodities, the policy thus established would be defeated by discriminating legislation, like that of Missouri." It is probably true that Mr. Justice Field at this time thought that the non-conflict with the actual regulations of commerce by Congress did not affect the question of the constitutionality of the law of Missouri one way or the other.

This is far from saying, as was decided in the case reported, that if Congress declares certain state police laws do not conflict with its will, then the state laws are valid.

In the case of the *County of Mobile* v. *Kimball*, 102 U. S. 591, the same Justice speaking of the power of Congress over commerce, says: "The subject, indeed. upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and *require* uniformity of regulation, affecting alike all the states; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries, or between the states which consists in the transportation, purchase, sale and exchange of commodities. Here there can of necessity be only one system or plan of regulation, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different states, each discriminating in favor of its own products and citizens, and against the product and citizens of other states. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the states, was to insure uniformity of regulation against conflicting and discriminating state legislation:" 102 U. S. p. 697.

I have given the whole quotation for the purpose of showing that the principle object which the great constitutional jurist had in mind when talking about the fact that

Congress had made no regulations, was to prove, that over those things which required uniformity of regulation the power was exclusively in Congress, and not to announce the doctrine, which was afterwards based on these expressions, that the will of Congress not conflicting, the state could make such regulations in the exercise of her police and other reserved powers.

In the case of *Bowman* v. *Chicago*, 125 U. S. 465, however, we have a decided change in the general reasoning of the court. Instead of treating the failure of Congress to make any specific regulations as something which did not make any difference to the validity of the state legislation, it is now treated as the main point to be decided. Sec. 1553 of the Code of the State of Iowa as amended by c. 143 of the Act of 1886, forbid a common carrier from bringing any intoxicating liquors into the state, except under the seal of the auditors of the county to which it was to be transported, certifying that the consignee was authorized to sell intoxicating liquors. Speaking of the legislation, Mr. Justice Matthews, delivering the opinion of the court, says: "It may, therefore, fairly be said, that the provision in question has been adopted by the State of Iowa, not expressly for the purpose of regulating commerce between its citizens and those of other states, but as subservient to the general design of protecting the health and morals of its people, and the peace and good order of the state against the physical and moral evils resulting from the unrestricted manufacture and sale, within the state, of intoxicating liquors:" 125 U. S. pp. 475, 476. The same Justice, speaking of the constitutionality of this law, refers to *Cooley* v. *Board of Port Wardens*, 12 How. 299, *supra*, as "a case in which the distinction was made between cases in which Congress has exerted its power over commerce, and those in which it has abstained from its exercise as bearing upon state legislation touching the subject:" 125 U. S. p. 481. But if we turn to this case, it contains nothing concerning the action or inaction of Congress as affecting the question of the validity of state legislation: see *supra*. However this may be, the court in the case before us holds: "The question, therefore, may be still considered in each case as it arises, whether the fact that Congress has failed in a particular instance to provide by law a regulation of commerce among the states, is conclusive of its intention that the subject shall be free from all positive regulations, or that, until it positively interferes, such a commerce may be left to be freely dealt with by the respective states:" 125 U. S. p. 483.

Thus, instead of the question whether the power over the subject is concurrent in the states or exclusively in Congress, these latter cases unquestionably change the ground of the discussion to the question, whether the silence of Congress is to be taken as an indication of its will that the particular commerce or means of transportation shall be free from state interference.

This change in position was forced upon the court by the change in economic and social ideas which produced the policy of State prohibition.

In the facts of the case of *Leisy* v.

Hardin, 135 U. S. 100, placed the court in an extremely difficult position. The question involved was whether a state law which prohibited the sale of intoxicating liquors by the importer in the condition of importation was valid. Had the court held that the grant to Congress of the power to regulate commerce *per se* rendered it impossible for a state to pass such laws, then prohibition, a policy which had been adopted by many of the states, would have become impossible. No one, no matter how ardent a Federalist, desired such result. Yet the court had repeatedly said that the power to regulate the first sale of an imported article was exclusively in Congress, and if it adopted what we have called Mr. Justice Story's idea of an exclusive power, which would preclude the states from regulating the first sale in the exercise of their police powers, any other conclusion was impossible. On the other hand, it was impossible to adopt, without qualification, Chief Justice Marshall's idea of an exclusive power, which held that a state could regulate, or, as he called it, affect commerce in the exercise of her police powers, althongh the power over commerce was exclusively in Congress, unless such state regulations conflicted with the laws of Congress. This view would have upheld the law of Iowa, but at the same time it would have overruled those long line of cases which had held that a state cannot regulate for the purposes of police or taxation, such act in furtherance of commerce as the first sale by the importer in the condition of importation.

The wisdom of the court was never better shown than in the solution of this difficult question, a solution which had been foreshadowed by Mr. Justice Field in his concurring opinion in the case of *Bowman* v. *Chicago*, 125 U. S. p. 507, and which has been practically carried out in the decision in the case which is reported in this number of the *Law Register*. The court in these three cases fully realizes that it has returned to the idea of an exclusive power held by Chief Justice Marshall when he wrote: "Powers may not conflict, but their exercise may" and again. "The idea that the same measure might, according to circumstanees, be arranged with different classes of powers, was no novelty to the framers of our own constitution." 9 Wh., p. 202.

The idea of an exclusive power originally advanced by Mr. Oakley in his argument in the case of *Gibbons* v. *Ogden*, which would prevent the state from regulating the subject of the grant to Congress, even in the exercise of any of her reserved powers, if it ever had been seriously entertained by a majority of the court is finally abandoned. Originally advanced by the opponents of any extension of the federal power over commerce, it had served its purpose in compelling many members of the court in the days before the war to adopt the proposition, that the states retained, in part at least, a concurrent power over the subjects of commerce. At the same time the court adopted as a rule concerning those subjects which in their nature are national and require a uniform regulation, that the inaction or silence of Congress will be taken as an indication

of its will, that such subjects shall be free from state interference. The result, therefore, of the controversy over the concurrent and exclusive power of commerce is simply this, that in certain cases the Supreme Court will interpret "the Silence of Congress," as indicating an intention that the commerce shall be so untrammelled, that any legislation of the states affecting such commerce conflicts with the legislative intention of Congress; while in certain other cases which do not seem to require uniform regulation, the "Silence of Congress" will not be interpreted as a legislative intention, that such commerce is to be free from state interference. Of course Congress has a right to interpret its own legislative provisions, and when it declares, as it did in the Wilson Bill, that its acts shall not be interpreted to interfere with the state police laws affecting liquors in the hands of the importer, the Supreme Court has no excuse for not following that interpretation,

There is one danger in the decision of the court in In Re Rahrer which has not as yet, I believe, been pointed out. It may be found in practice that state laws legitimately designed to aid the internal commerce of the state, or provide the state with revenue, may be permitted by a Congress in which the influence of a particular state is powerful. Many of these laws would seriously embaress interstate commerce and be a great lever by which to extend the taxing power of the states. These difficulties I believe will be settled when they arise. Constitutional law is something more than the interpretation of a written instrument, it is also the adaption of that instrument to changing economic and social conditions. Nothing proves this more clearly than the solution of the constitutionality of prohibition in the three cases of *Bowman* v. *Chicago*, *Leisy* v. *Hardin* and *In Re Rahrer*.

Whenever the present doctrine of the "Silence of Congress" shall cease to serve its purpose, it will be modified to meet new conditions.

JENNINGS, *et al. v.* GRAND TRUNK RY. CO., OF CANADA.

[*Court of Appeals of New York, Second Division. Oct. 6, 1891.*]

CARRIER OF GOODS—CONTRACT OF SHIPMENT—LIABILITY FOR INJURY—LIMITATION.

Appeal by defendant from judgment entered upon order of the general term of the Supreme Court in the fifth judicial department, affirming judgment entered on report of referree in favor of the plaintiffs. Affirmed.

For shipment and transportation to East St. Louis, Ill., J. H. Shanley & Co. caused to be delivered to the defendant, and the latter received potatoes at the times, places, and in the quantities following: April 18, 1881, at Prescott, Canada, 401 bushels; April 18, 1881, at Edwardsburgh, Canada, 812 bnshels; April 18, 1881, at Brockville, Canada, 400 bushels; April 26, 1881, at Kingston, Canada, 402 bushels. The potatoes belonged to J. H. Shanley & Co., who were named as consignees of all the potatoes except those delivered to the defendant at Prescott. They were consigned to the order of the Merchants' Bank of Canada, with directions to advise